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ANOTHER ATTEMPT TO EVADE THE LOTTERY LAWS.—Fourteen years ago an ingenious merchant tailor in Minneapolis devised a scheme for a "club" of patrons. Each person who joined the "club"—and it consisted of forty members—signed a written contract having forty numbered coupons, whereby he agreed to pay two dollars at the time of signing and one dollar each week for forty consecutive weeks in consideration for which he should each week have the privilege, upon the surrender of a coupon, of drawing for a forty-dollar suit of clothes. Each week the lucky member who drew the suit withdrew from the "club," and a new member was taken in. Each member was, however, guaranteed a forty-dollar suit at the end of his forty weeks, if he did not draw one sooner, and any member had the right to drop out at any time and receive credit for the full amount paid, such credit to be taken out in trade. The tailor was prosecuted under the lottery statutes and convicted. *State v. Moren*, 48 Minn. 555.

Undeterred by the fate of the Minneapolis tailor, or possibly ignorant of it, a tailor in Sault Ste. Marie, Michigan, wishing to increase his business, formed a similar "suit club." He was prosecuted under the Michigan statute against lotteries, was found guilty as a matter of law on the evidence, and the opinion of the Supreme Court affirming the judgment below has just appeared. *People v. McPhee* (1905), — Mich. —, 103 N. W. Rep. 174.

It was sought by the defendant to exclude his case from the operation of the lottery statute on the ground that the members of the "club" took no risk of loss, but in all cases were guaranteed the full equivalent of the money paid. In other words, it was contended that a scheme whereby one might gain but could not lose was not a lottery under the statute. But the court said that the term "lottery" was generic, and should be construed broadly with a view to remedying the mischiefs intended to be prevented. "No sooner is it defined by a court than ingenuity evolves some scheme within the mischief discussed, but not quite within the letter of the definition given." And the language used in *Ballock v. Maryland*, 73 Md. 1, was approved, as follows: "Our statute does not justify a court in deciding a thing is not a lottery simply because there can be no loss, when there may be considerable contingent gain, or because it lacks some element of a lottery according to some particular dictionary definition, when it has all the other elements, with all the pernicious tendencies which the state is seeking to prevent."

The Michigan Supreme Court evidently has no intention of frittering away the moral benefits of the anti-lottery law by sustaining technical and unsubstantial objections to its operation.

SAVING EXCEPTION ON OVERRULING OF MOTION TO QUASH SUMMONS.—The diversity of views held by the courts relative to the right of a defendant to plead generally, without waiving the objection to the jurisdiction of the court over the person, after a motion to quash the writ for defects therein has been overruled, and exception to such ruling saved, is well illustrated in the majority and dissenting opinions in the recent case of *M. Fisher, Sons & Co. v. Crowley* (1905), — W. Va. —, 50 S. E. Rep. 422. It was there

held, that a defect in the summons commencing an action in a court of record is not waived by pleading to the merits after the overruling of a motion to quash, to which an exception has been taken and made a part of the record.

While this is, we believe, the better rule, it is by no means uniformly so held by the courts. In *Ry. Co. v. Wright*, 50 W. Va. 653, which the court attempts to distinguish in principle from the principal case, the rule is stated as follows: "When a defendant appears and objects to the jurisdiction and his objection is overruled, he must then elect either to stand upon his objection or go into the merits. Going into the merits waives his exceptions to the service of process. The latter rule is founded on justice and reason. For although the defendant may not be served with process, yet if he appears and contests the case and a fair trial is had why should he be permitted to invalidate the judgment thus obtained, because the process to bring him into court was not legally served upon him?" This view has been accorded the support of many of the courts, and the decisions sustained by a course of reasoning which is quite similar in all the opinions. A fair example is that of *Sealy v. Cal. Lumber Co.*, 19 Ore. 94, wherein the court said, "A defendant cannot answer the complaint and make a full defense on the merits without making a general appearance in spite of his special appearance, and when he does so he invokes the judgment of the court and submits himself and his rights to its jurisdiction and cannot longer be heard to say that it had no jurisdiction. He cannot fight his battle on the merits under a special appearance. The law will not allow him to occupy an ambiguous position to avail himself of its jurisdiction when the judgment is in his favor and to repudiate it when the result is adverse to him. He ought to do one thing or the other—either fight it out on the line of special appearance; or, if he appear and go to trial, accept its incidents and consequences." *Garrett v. Herring Furn. Co.* (1904), — S. C. —, 48 S. E. Rep. 254; *Franklin Life Ins. Co. v. Hickson*, 97 Ill. App. 387. But the objection to this argument lies in the fact that it would either make of every trial court a court of last resort, or require the defendant "to do what is impossible for other mortals—correctly forecast what will be the decision of the court of last resort upon the question."

As supporting the rule announced in the principal case, and contrary to that last expressed, we quote from the case of *Chandler v. Citizens National Bank*, 149 Ind. 601, as follows: "The settled rule in this jurisdiction and in others also, is that a party to an action who under a special appearance, in due season, unsuccessfully denies the jurisdiction of the court over his person, does not waive the question of jurisdiction of his person by thereafter answering over, and going to trial upon the merits of the cause of action. The authorities assert that the defendant under such circumstances, having at the very threshold resisted the jurisdiction of the court in a legitimate manner to the full extent of his power, is not required to desert his case, and leave his adversary to take judgment against him by default." Having unsuccessfully contested the jurisdiction, it is his privilege and duty to make the best defense of which he is capable. *Benedict v. Johnson*, 4 S. D. 387; *Am. Wire & Steel Bed Co. v. Goldman*, 83 N. Y.

Supp. 330; *Mullen v. Canal Co.*, 114 N. C. 8. The defendant should appear specially, object to the jurisdiction and if the objection is adversely ruled upon, save an exception for appeal. That this is the proper practice is indicated by the following cases: *Perkins v. Hayward*, 132 Ind. 95; *Winfield Nat'l Bank v. McWilliams*, 9 Okla. 493; *Mullen v. Canal Co.*, supra; *Lilliard v. Brannin*, 91 Ky. 511. The case assumes a different aspect when the defendant, although objection is made specially to the jurisdiction of the court over his person, files a counter-claim or asks affirmative relief. He thereby becomes an actor in the suit and institutes a proceeding which has for its basis the existence of an action to which he must be a party. He thereby submits himself to the jurisdiction of the court and no disclaimer which he may make on the record, that he does not intend to do so, will be effectual to defeat the consequences of his act. 2 ENC. PLEADING AND PRACTICE, p. 626; *Chandler v. Citizens Nat'l Bank*, supra; *Montague v. Marunda*, — Neb. —, 99 N. W. Rep. 653; *Lower v. Wilson*, 9 S. D. 252; *Grant v. Birrell*, 72 N. Y. Supp. 366.

But the court went further and held, that it is not necessary for a defendant in appearing for the purpose of quashing the writ to cause the record to recite that his appearance is for that purpose only, but whether an appearance is general or special is to be determined by the record as it stands at the time the motion is made. In *State v. Thacker Coal & Coke Co.*, 49 W. Va. 140, the record recited that the defendant appeared by attorney and moved to quash the summons and the return of the sheriff thereon endorsed, which motion the court overruled, whereupon the defendant then and there excepted to the ruling of the court. The court held the appearance to be general and said, "An appearance for the purpose of taking advantage of defective execution or non-execution of process must be a special appearance for that purpose alone, and must be so stated at the time of making the appearance." Although attempting to "reconcile" the conflicting views as expressed in several previous opinions, the court apparently overlooked this case, which seems in point, and expresses, we think, the sounder view. It is true one may not make a general appearance special by denominating it such; but the tendency of the courts is to construe that a general appearance which is not designated, or is not clearly shown to be, a special appearance. It is certainly the more prudent course to specifically state in each special appearance pleading that "the defendant appears specially and for the purpose of this motion only;" and this practice is amply supported by authority. *Kinkade v. Myers*, 17 Ore. 470; *Collier v. Faek*, 66 Ala. 223; *Deshler v. Foster*, 1 Morris (Ia.), * 403.

WILLS EXECUTED WITHOUT ANIMUS TESTANDI.—The Supreme Court of Massachusetts has recently decided a case involving a fundamental question concerning the law of wills that is not often directly presented. The question is as to proof that a will drawn in due form by a scrivener, and executed by a sober man in sound health of body and mind and under no restraint, was not executed as a will, nor intended ever to have effect as such.

The will in question was offered for probate by Mary Fleming, the